LIBRARY
SUPREME COURT, U.S.
MAR 1

No. 73-1088

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

LIFE OF THE LAND, ET AL., *Petitioners*,

v.

CLAUDE S. BRINEGAR, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

TOBIAS C. TOLZMANN
2222 Kalakaua Avenue
Honolulu, Hawaii 96815
Counsel for Respondents Kalihi-Palama Community Council, James Y. Muraoka, and Takeshi Uyesugi

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

Page

Questions presented 1

Statement of the Case 3

Argument:

I. To the extent discernible, petitioners' grievances are those of the disappointed litigant whose claims have been heard fully, fairly and at great length by two lower courts and been found wanting in fact. This Court's certiorari power ought not be consumed in review of factual questions .. 33

II. Deficiencies in petitioners' proof are massive, extending to failure to demonstrate so much as standing. Upon the facts (or lack hereof) here, there is no conflict with decisions in other circuits 35

III. The existence of possible nuances of difference among the circuits in defining the precise standard of review in a NEPA case could be of only academic interest in this case, where the *basis* of review was inquiry sufficiently broad to accommodate any conceivable test 44

IV. In any event, the relief sought by petitioners is equitable injunction, the availability of which depends not alone on relative legalities but on a discretionary balancing of the interests affected. There is not the least hint in the petition that the courts below abused their discretion in withholding that drastic remedy here 48

Conclusion 51

CITATIONS

CASES: Page

Aberdeen & Rockfish R. Co. v. SCRAP, 409 U.S. 1207, rev'd *sub nom.* United States v. SCRAP, — U.S. —, 37 L.Ed.2d 254 ..... 36, 37, 49, 50
Allison v. Froehlke, 470 F.2d 1123 (5th Cir. 1972) 40
Berenyi v. Immigration Service, 385 U.S. 630 35
Caffasso v. Pennsylvania R. Co., 169 F.2d 451 (3rd Cir. 1948) 44
Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402 ..... 42, 43, 46
City of New York v. United States, 344 F.Supp. 929 (E.D.N.Y. 1972) 46
Environmental Defense Fund, Inc. v. Armstrong, 487 F.2d 814 (9th Cir. 1973) 45, 46
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 35
Greene County Planning Board v. Federal Power Com'n, 455 F.2d 412 (2nd Cir. 1972), cert. den. 409 U.S. 849 ..... 43, 44
Hanly v. Mitchell, 460 F.2d 640 (2nd Cir. 1972) 47
Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275 (9th 1973) 46, 47
Lathan v. Volpe, Nos. 72-2932 and 72-2974, December 7, 1973, 9th Circuit 45, 46
Lemon v. Kurtzman, 411 U.S. 182 48
Life of the Land v. Brinegar, No. A-435, November 21, 1973, — U.S. —, 38 L.Ed. 2d 341 ..... 8, 10
National Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972) 21, 38, 39, 40, 41, 43
New England Trust Co. v. Farr, 57 F.2d 103 (1st Cir. 1932) 44
Sierra Club v. Froehlke, 345 F.Supp. 440 (W.D. Wisc. 1972), aff'd 486 F.2d 946 (7th Cir. 1973) 47

STATUTES AND RULES:

Administrative Procedure Act, 5 U.S.C. §§ 706(2) (A) and (D) 44, 47

Airport and Airways Development Act, 49 U.S.C. § 1716(c)(4), Pub. L. 91-258, Title I, § 16(c)(4), 84 Stat. 226 ..... *passim*

Page

Federal Rules of Civil Procedure, Rule 52(a) 2, 34

National Environmental Policy Act, 42 U.S.C. § 4332 (2)(C), Pub. L. 91-190, Title I, § 102(2)(C), 83 Stat. 853 .....*passim*

Rules of Evidence for United States Courts Magistrates (proposed), Rules 403 and 611(a) 44

Rules of the U.S. Supreme Court, Rule 23(4) 34

MISCELLANEOUS:

I. M. Hale, Pleas of the Crown 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1088

LIFE OF THE LAND, ET AL., *Petitioners,*

v.

CLAUDE S. BRINEGAR, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

The academically ambitious questions tendered by the petition simply do not arise from the record here. At best, the record and the petitioners' surviving contentions could be said to raise such questions as:

1. Whether environmental groups and allegedly interested individuals are entitled to any manner of judicial relief, much less drastic halt by injunc-

tion of an important federally supported airport project, upon naked allegation and argument that an environmental impact statement (EIS) promulgated by the Secretary of Transportation pursuant to § 102(2)(C) of the National Environmental Policy Act,[1] and corresponding findings under § 16(c)(4) of the Airport and Airways Development Act,[2] were inadequate for failure to discuss at sufficient length, or at all, certain "alternatives" to the project suggested by petitioners, and because a financially interested private contractor may have participated in the preparation of the EIS—in the absence of proof that the "alternatives" so suggested by petitioners were in any way reasonable or feasible or that the Secretary had in fact abdicated any significant part of his responsibility to a private contractor, or any one else, and /or in the face of adverse findings of fact by a district court, concurred in by the court of appeals, not shown to be "clearly erroneous" within the meaning of Rule 52(a), Federal Rules of Civil Procedure; and

2. Whether in any event the district court and /or the court of appeals, in the light of the facts and circumstances here, could be said to have abused their discretion in having weighed the interests of large numbers of Honolulu residents in prompt relief from noise pollution and danger of disastrous aircraft accident in their midst, found by

---

[1] 42 U.S.C. § 4332(2)(C), Pub. L. 91-190, Title I, § 102(2)(C, 83 Stat. 853, effective January 1, 1970, hereinafter "NEPA."

[2] 49 U.S.C. § 1716(c)(4), Pub. L. 91-258, Title I, § 16(c)(4), 84 Stat. 226, effective May 21, 1970, hereinafter "AADA."

> the courts below upon an ample record to be among the purposes and reasonably predictable results of the project, against the demands of petitioners for additional study and more meticulous formal compliance with NEPA; having struck the balance in favor of the former; and having accordingly denied injunctive relief, the only form of judgment which petitioners seek or, apparently, are willing to accept;

neither of which questions involve important features of Federal law, or for that matter any plausibly debatable proposition of Anglo-American legal understanding, requiring resolution by this Court.

STATEMENT OF THE CASE

Involved here is an additional aircraft runway, construction of which is well underway,[3] being adjoined to the Honolulu International Airport, some 6,700 feet south and seaward from the existing principal runway at that facility, which is unhappily located in the midst of urban Honolulu. The project is the net upshot of some 10 years' concern, investigation and planning by various citizens' groups in Hawaii, the executive, legislative and administrative branches of government in that State, and appropriate federal agencies,[4] aimed at relief of nearby residential areas and downtown Honolulu from aircraft noise pollution and danger of dis-

---

[3] See Motion to Vacate Order Staying Mandate, filed by the State respondent in No. A-435 on November 13, 1973, p. 4. These answering respondents are informed and believe that fill work has proceeded apace since that date at the rate of two acres per day.

[4] See court of appeals opinion, 485 F.2d at 464-65, App. A of Petition, pp. 6-8.

astrous aircraft accident.[5] Apart from relieving these conditions of prime concern,[6] the project was seen as likely to produce various other environmental side benefits as well.[7]

---

[5] Under present conditions noise pollution is so bad as to interfere with instruction in schools, Ex. D-1, p. 8, not to mention proceedings in courts, including particularly the proceedings of the district court here. See, *e.g.*, Transcript, Vol. I, p. 381, Vol. II, pp. 473, 575, 765:

> "MR. HART: Excuse me, I can't hear. There's an airplane.
> "(Airplane flying over)."
> "Q. . . . Would you explain—
> "(Airplane flying over)
> "THE COURT: We're going to have a noise station in the courthouse.
> "THE WITNESS: That wouldn't be there with the Reef Runway."

As to crash dangers, the court of appeals observed, with ample record support (Transcript, Vol. II, p. 709), that

> ". . . There is evidence that jet aircraft mishaps most often occur within forty seconds after take-off, or about 1.6 miles from the end of the runway. In the case of HIA's present configuration, this would place the aircraft in the midst of the Kalihi-Palama residential neighborhood." (485 F.2d at 464, App. A of Petition, p. 6).

There was also evidence that 30 seconds after take-off, planes are over a school complex in the Kalihi-Palama area, Transcript, Vol. II, p. 714, and that just such a disaster was recently averted by only a matter of yards and seconds, Transcript, Vol. II, p. 711.

[6] As the court of appeals noted, "Such a runway would largely eliminate the spectre of a disastrous aircraft accident in a populated residential area, and would also reduce noise pollution by moving it more than a mile away." 485 F.2d at 465, App. A of Petition, p. 7.

[7] See 485 F.2d at 465, App. A of Petition, pp. 8-9:

> "There is nothing in the record indicating that the planners of the project believed, or had reason to believe, that the project would have an irreparably deleterious effect upon

Toward the tail end of planning for the project, NEPA was enacted and became effective. Because federal financial assistance under AADA was involved, the project became a "major Federal action significantly affecting the quality of the human environment" within the meaning of § 102(2)(C) of NEPA, and an EIS was prepared and promulgated accordingly. The court of appeals observed, and it is not disputed, that "there is ample evidence in the record indicating that [the planners] have acted in a good faith attempt to comply with both the spirit and letter of NEPA,"[8] albeit that the EIS in question is admittedly something less than a literary masterpiece.[9]

Be that as it may, the petitioners, not content with their markedly effective participation in the preceding planning and hearing phases of the project,[10] filed ac-

---

the environment. On the contrary, the possibility of various environmental side benefits, such as reduction of air and water pollution, enhancement of recreational boating facilities and improvement in area fishing . . . were all hopefully anticipated."

[8] 485 F.2d at 466, n. 7, App. A of Petition, p. 11.

[9] The district court observed, and these respondents have no hesitancy in agreeing, that there may have been some "delinquency . . . in draftsmanship" of the EIS, and that "it leaves much to be desired as an example of the art of communication." 363 F.Supp. at 1174, 1175, App. C of Petition, pp. 37, 39.

[10] At least two of the petitioners expressed concern during the planning stages of the project about the effect of the same upon a habitat of some 100 Hawaiian Stilts, a relatively rare species of bird. They did not on that account, or otherwise, oppose the project as such but urged only that some replacement habitat be provided for the birds. The planners were more than sensitive to this problem. Unchallenged by the Petition is the observation of the court of appeals that:

"The record indicates that the plight of the Stilts has continuously been a matter of concern to the planners of the

tion in the District Court for the District of Hawaii on the eve of the opening of bids for construction, praying halt by injunction on account of alleged departures from the requirements of NEPA and AADA.[11] In the vividly dramatic terms which have come to characterize environmental litigation, the complaint alleged all manner of environmental horrors as likely to be visited on the biosphere by the project, including "impact of increased tourism in Hawaii," "effect on the endangered Hawaiian Stilt," destruction of "surfing and recreational areas in the vicinity," injury to the "marine environment," increase of "noise levels in the vicinity," "harm to wildlife and bird roosting and resting areas, harm to valuable fishing sites, destruction of water recreation facilities, loss of the effective use of the proposed Sand Island Park due to high aircraft noise over the area from the proposed runway, loss of reef area for marine mollusks, loss of surfing sites, loss of tuna bait grounds, and loss of at least 765 acres of marine wildlife habitat area." It was also alleged that the EIS "fails completely to discuss some reasonable and feasible alternatives" and "treats other alternatives in insufficient detail," and that in any event the whole business was illegal "because the preparation of the Final Impact Statement was improperly delegated by the Federal Defendants to the State Defendants, and by the State Defendants to the RALPH M. PARSONS CO., INC." Suitably impressed by these

---

project. As recommended by appellants, the replacement habitats at nearby Pearl Harbor Naval Station are being developed in conjunction with the project. Also included in the project itself is the construction of certain ponds and islets suitable for the birds at a cost in excess of $350,000." (485 F.2d at 473, App. A of Petition, p. 28).

[11] Complaint, filed November 8, 1972.

allegations, the district court entered a temporary restraining order. There followed a hearing on petitioners' motion for preliminary injunctive relief, which occupied some seven days' trial time, and occasioned consideration of an uncounted several thousand pages of documentary material, not to mention some 898 recorded pages of testimony, much of which was received by the district court over objection.[12]

Following such extended hearing, the district court denied the motion for preliminary injunction and lifted the temporary restraining order.[13] Some months later, petitioners availed themselves of opportunity for trial on the merits of their prayer for permanent injunction, at which time, however, they adduced no further substantial evidence but submitted on the record made upon the earlier motion for preliminary injunctive relief.[14] The district court denied the prayer for permanent injunction, and a motion for injunction pending appeal.[15] Appeal to the United

---

[12] For example, the better part of an afternoon and morning were consumed by the district court's entertainment, over objection, of what can only be described as an unseemly lecture by a law professor in the University of Michigan, said to specialize in teaching and writing about "environmental" law, concerning what NEPA means and how it should be applied, in which connection a ream or more of paper was received as illustrative of what a "really good" EIS should look like. Transcript, Vol. I, pp. 397-425, Vol. II, pp. 426-447.

[13] Decision and Order of December 22, 1972, 363 F.Supp. 1171, App. C. of Petition, pp. 33 *et seq.*

[14] See Transcript of Proceedings, March 29, 1973, pp. 2-3, 363 F.Supp. at 1176, n. 19, App. C of Petition, p. 42.

[15] Final Decision and Order of April 12, 1973, App. D of Petition, pp. 43-44.

States Court of Appeals for the Ninth Circuit followed, during the pendency of which that court entered an injunction.[16] In due course the court of appeals affirmed the district court, and dissolved the injunction pending appeal.[17]

Some months later still, petitioners, after having unsuccessfully applied to the court of appeals for rehearing and or injunction pending petition for certiorari in this Court, obtained from Mr. Justice Douglas, as Circuit Justice for the Ninth Circuit, an *ex parte* order staying the mandate of the court of appeals and reinstating injunction *pendente lite* pending receipt of memoranda in opposition, which stay and injunction was re-affirmed some five days later.[18] Two weeks later, the full Court granted motions to vacate the stay and injunction entered by Mr. Justice Douglas.[19] The present petition followed.

At this juncture, the case is justiciably troublesome only in the difficulty it presents in discerning precisely what petitioners' essential grievance is, and in wading through petitioners' manifest inability or unwillingness to appreciate that allegation is not evidence and that evidence is not necessarily proof.

If the original complaint of November 8, 1972 reflected afterthoughts which had not occurred to peti-

---

[16] 485 F.2d at 463, App. A of Petition, p. 4.

[17] 485 F.2d at 474, App. A of Petition, p. 30.

[18] *Ex parte* order in No. A-435 was entered on November 2, 1973. The order re-affirming the same after consideration of memoranda in opposition was entered on November 7, 1973.

[19] Life of the Land v. Brinegar, No. A-435, November 21, 1973, —— U.S. ——, 38 L.Ed. 2d 341.

tioners during the preceding 10 years' planning,[20] the extended hearings in December 1972 inspired them to still further afterthoughts which had not occurred to them at the time of pleading, namely, expressions of vague concern about air and water quality, and suggestions that there may have been some irregularity in the publication and dissemination of the EIS.

For the most part, however, the petitioners did not see fit to support their several claims, however and whenever raised, by any manner of evidence, much less proof satisfactory to the trier of fact. For example, no evidence whatever was offered even remotely supporting claims of prejudicial harm to anyone as a result of alleged irregularities in the publication and dissemination of the EIS,[21] or of allegations of injury

---

[20] Over a period of four years from 1967 through April 1970, some 46 or 47 public meetings of a citizens' Task Force Committee concerning noise pollution and crash dangers in Honolulu were held. 485 F.2d at 464-65, App. A of Petition, p. 7. When the enactment of NEPA intervened in the planning process, a draft EIS was distributed to, and comments invited from, some 80 federal, state and local agencies, private groups and interested individuals (Ex. D-1, pp. i-x), including at least two of the present petitioners and one of their expert witnesses, namely, Life of the Land, Hawaii Audubon Society and one Dr. Karl Bathen (Ex. D-1, pp. ii, v, and see Transcript, p. 311). Another plaintiff below, Sierra Club, was also furnished with a draft EIS and invited to comment (Ex. D-1, p. iv). Sierra Club, however, has apparently seen fit to accept the decision of the court of appeals and to forego participation in the present petition. See letter of January 3, 1973, from petitioners' counsel to the Clerk. While not required by NEPA, a formal public hearing was held on March 22, 1971. 485 F.2d at 464, App. A of Petition, p. 8. There is no record of any of the petitioners' having expressed concern for anything other than the habitat of the Hawaiian Stilt. See 485 F.2d at 465, 473, App. A of Petition, pp. 8, 28.

[21] Notwithstanding the absence of any proof on the subject, petitioners pursued claim on this account to the court of appeals,

to the "marine environment, . . . harm to valuable fishing sites, destruction of water recreation facilities, . . . loss of reef area for marine mollusks, . . . loss of tuna bait grounds," and there remains unchallenged the anticipation reported in the EIS of "an enhancement of recreational boating facilities and an improvement in fishing conditions as a result of improvement in the water quality of Keehi Lagoon, . . . and the construction of channels to the open sea."[22] Similarly unpursued by proof were dire allegations concerning noise and air pollution by the project. Such evidence as there was on the subjects seemed calculated to suggest, at best (and apart from their complaint petitioners never claimed more), not that the project would increase these forms of pollution, but that additional studies might conceivably have shown that the extent of reduction of the same might not be as great as anticipated.[23] Petitioners' "evidence" in support of allegations concerning such matters as demographic effects of the project, water quality, recreational surfing and wildlife, was so manifestly attenuated and lacking in probative worth as to have led the courts below to find the same unsatisfactory.

---

which noted that "appellants had ready access to these documents, and did in fact avail themselves of them," and described petitioners' contentions in this regard as "an attempt to place form over substance." 485 F.2d at 468, App. A of Petition, pp. 16-17.

[22] 485 F.2d at 473, App. A of Petition, p. 26. Apart from the fact that there is no evidence that a biologically valuable "estuary" is involved here, the record does not justify Mr. Justice Douglas' expressions of concern in No. A-435 that "estuaries are essential in part of the life cycle of two-thirds of the marine life," and that 'dredging makes these estuaries biological deserts for years to come." ——U.S. at ——, 38 L.Ed.2d at 343.

[23] 485 F.2d at 470, 472, App. A of Petition, pp. 20-21, 24-25.

Demographic fault-finding took the form of extended testimony by a sociologist to the effect that as human populations increase "some very bad things" begin to happen,[24] a proposition to which respondents unsuccessfully offered to stipulate.[25] The witness syllogized that since the EIS indicates that non-construction of the project would, among other things, "limit the growth of the tourist industry, one of Hawaii's largest industries,"[26] it might be logically posited that building it would tend to *increase* tourism, which in turn would tend to increase the permanent population of Hawaii, and engender the evil effects upon which the witness discoursed.[27] The witness' expert suggestion was that population growth should be stopped or retarded, and decision to go forward or not with the project deferred, for a period of some 10-15 years pending study and reflection upon "what size of population we want."[28] The court of appeals appraised this "evidence" as follows:

> "We reject this reasoning. That an increase in Honolulu's tourism will result in an increase in that city's permanent population is speculative. Certainly there is no empirical data in the record supportive of the allegation. We agree with the district court's conclusion that 'requiring the kinds of demographic discussion suggested by [appellants] is unreasonable in the context of this project.'"[29]

---

[24] Transcript, pp. 15-82.

[25] *Id.* at p. 19.

[26] Ex. D-1, p. 35.

[27] Transcript, pp. 38-40, 46-47.

[28] *Id.* at pp. 72, 77-79.

[29] 485 F.2d at 549, App. A of Petition, p. 19. See also 363 F.Supp. at 1174-75, App. C of Petition, p. 38.

On the subject of water quality, petitioners, through an expert witness called for that purpose, complained that one of the several hydraulic studies referred to in the EIS might be read as being at odds with the EIS' conclusion that the project would *improve* water quality in the area.[30] The same witness acknowledged, however, that the particular study in question had been addressed to an earlier proposed configuration of certain seawalls, which configuration was thereafter changed for the very purpose of correcting the problems to which petitioners obliquely alluded,[31] and that a subsequent study based on the new configuration, prepared by experts whose qualifications the witness endorsed,[32] *was* supportive of the EIS conclusion that the project would improve water quality.[33] Petitioners, nevertheless, nakedly argued below that the latter "is a very brief study of an extremely complicated problem which was done on rather short notice and it has some deficiencies,"[34] supported by "evidence" in the form of a series of letters from some University of Hawaii professors, who were not made available for cross-examination, commenting adversely upon the relative professional excellence of the study.[35] The courts below were unpersuaded that there was any factual basis for finding that the Secretary had unreason-

---

[30] Transcript, pp. 314-20. See Ex. D-1, pp. 18, 45, and Ex. D-18.

[31] Transcript, pp. 320, 323.

[32] Ex. D-6, Transcript, pp. 316, 318, 324-25.

[33] Transcript, p. 325.

[34] Id. at p. 346.

[35] Exhibits P-28, P-29, P-30, P-31, P-32 and P-39. See Transcript, pp. 869-70.

ably concluded that the project would have no significantly adverse effect upon water quality.[36]

Attempted proof by petitioners of allegations of "loss of surfing sites" took the form of testimony by a lay, so-called "out-reach" worker, who reported hearsay speculations by several disadvantaged youths with whom he works to the effect that the project might produce "some kind of current . . . that are not well liked by surfers" at a surfing spot favored by the youngsters some two miles away from the project, and might even attract sharks.[37] The youngsters said to have expressed these thoughts were not made available for cross-examination, and the factual basis, if any, for their rather colorful speculations cannot be ascertained from the record. The court of appeals noted that "the district court was understandably unpersuaded by this hearsay testimony." [38]

As noted by the court of appeals, "the *only* clearly documented adverse environmental effect of the project which could be said to be significant" [39] is that disclosed and discussed at length in the EIS itself, namely, displacement of some 186 acres of silted coral mudflats used for feeding and roosting by birds, including some 20-100 individuals of the relatively rare Hawaiian Stilt species.[40] The extraordinary extent to which those

---

[36] 485 F.2d at 472-73, App. A of Petition, pp. 25-26.

[37] Transcript, pp. 84-119.

[38] 485 F.2d at 473, App. A of Petition, p. 27.

[39] 485 F.2d at 473, App. A of Petition, p. 27. (Emphasis added).

[40] Ex. D-1, p. 26; Ex. D-44.

responsible for the project went to minimize harm to and accomodate the birds is undisputed:

> "The record indicates that the plight of the Stilts has continuously been a matter of concern to the planners of the project. As recommended by appellants, the replacement habitats at nearby Pearl Harbor Naval Station are being developed in conjunction with the project. Also included in the project itself is the construction of certain ponds and islets suitable for the birds at a cost in excess of $350,000." [41]

Petitioners offered no evidence that the effect of the project on wildlife was different or worse than as reported in the EIS or that such minimal harm as was acknowledged was unavoidably irreparable. Indeed, petitioners offered no evidence on the subject at all, save the testimony of a recently elected lay officer of the Hawaii Audubon Society,[42] who disclaimed any professional expertise enabling him to give an opinion about birds and their habitats,[43] and whose sole apparent office was to mouth from the witness stand the "position" of the Hawaii Audubon Society concerning the project:

> "Q. (By Mr. Sherwood) Let me ask you this, Mr. Mull, are you or is the Hawaii Audubon Society necessarily opposed to the building of the Reef Runway?
> "A. Well, we have taken no position in opposition to the Reef Runway.
> "Q. Why are you a plaintiff in this lawsuit?
> "A. I beg your pardon?

---

[41] 485 F.2d at 473, App. A of Petition, p. 28.

[42] Transcript, pp. 272-89.

[43] *Id.* at p. 273.

> "Q. Why are you a plaintiff in this lawsuit? What is the concern of the Hawaii Audubon Society?
>
> "A. The concern is that the impact statement reflects a situation in terms of current knowledge with respect to wildlife and wildlife replacement areas as accurately as possible and that the—that if replacement is a prospect that that replacement be indeed adequate, as is stated in the impact statement, basically, we question the adequacy of the proposal for replacement habitat. . . ." [44]

Becoming understandably impatient with petitioners' extended presentation of obviously irrelevant "evidence" (all of which it nevertheless entertained), the district court was provoked to observe in the context of this witness' testimony that, "Somewhere along the line I imagine we're going to get to the legal issues." [45] The court of appeals, generously crediting this "evidence" at face value, no less understandably saw it as falling short of demonstrating *irreparable* environmental harm:

> "The main contention of appellants here is that the size of the replacement habitats may prove to be inadequate. But the district court noted, and we concur, that if the size of the habitats do indeed prove to be inadequate, there is no reason why

---

[44] *Id.* at 285-86. See also Transcript, pp. 275-76, where the witness confirmed that the "position" of the Hawaii Audubon Society remained as given in writing in 1971 during the planning stages of the project, as follows: "The Hawaii Audubon Society strongly recommends that planning for the runway include provision that shallow feeding areas at least equal in area to those destroyed be created . . ., a constructed area of twice the size of that destroyed would be more desirable."

[45] Transcript, p. 284

adjustments could not be made even if the construction as planned proceeds to completion." [46]

Notwithstanding that petitioners had thus failed in threshold demonstration of fact that any relevant feature of the environment, much less themselves, had suffered or would suffer any irreparable harm as a result of the project, the courts below accorded them standing to grumble further.[47] It is this further grumbling only which is the subject of the present petition, petitioners having evidently abandoned allegations concerning such things as purported irregularities in the publication and dissemination of the EIS, and injury to fishing, recreational facilities, population levels, air and water quality, wildlife, etc.[48]

Record support for such surviving contentions as petitioners would have this Court consider, namely, that the Secretary had improperly delegated his responsibilities under NEPA to a financially interested private contractor, and that alternatives to the project were not properly considered, is likewise meagre, obscure or non-existent.

For example, petitioners' statement that they "were precluded by the trial court from developing the relative degrees of participation by Parsons, the state agency, and the federal agency, although Petitioners'

---

[46] 485 F.2d at 473, App. A of Petition, p. 28.

[47] See 363 F.Supp. at 1176, n. 19, App. C of Petition, p. 42; 485 F.2d at 463, n. 2, App. A of Petition, p. 3.

[48] Purported grievances on these subjects were pursued by "voluminous briefs" to the court of appeals, and there rejected on factual grounds. 485 F.2d at 468-70, 472-73, App. A of Petition, pp. 15-21, 24-28. The petition may be searched in vain for any suggestion of error in these regards.

counsel made ample offers of proof on this issue," and that the court of appeals upheld a ruling by the district court "*as a matter of law* that the preparation of an EIS may be delegated to a private party with a major financial interest in the proposed project," [49] is purely and simply, and nothing more nor less, than a bald and bold misstatement of the record. In the first place, the district court at no time ruled as a matter of law or otherwise that responsibility for an EIS might be delegated to an interested private party, having ruled only that in and of itself there is nothing wrong as a matter of law in having an interested person participate in the drafting of an EIS; and secondly, far from being precluded from pursuing the subject, petitioners were expressly granted leave by the district court to offer such proof as they were disposed to present:

> "THE COURT: I already ruled that there was nothing wrong with having somebody with a financial interest in the project assist in drafting the impact statement.
>
> "MR. HART: Okay. I've heard the Court's ruling. I, of course, accept it, but I would like to make a record on it.
>
> "THE COURT: Yes, and I'm allowing you to do so." [50]

Petitioners' counsel plainly understood "that it was more than merely making an offer of proof . . . the Court would permit. It was a factual record. . . ." [51]

---

[49] Petition, p. 10. (Emphasis in original).

[50] Transcript, p. 359.

[51] *Id.* at p. 358.

Their offer was as follows:

> ". . . If the public agency actively participates in the preparation of the environmental impact statement, the law may be complied with. If it does nothing more than comment on a final product of a contracted out private consulting agency, the law may not be complied with and that's my offer of proof." [52]

In pursuit of this offer, petitioners subpoenaed an employee of the consultant in question and examined him at some length concerning his contribution to the preparation of the EIS. [53] The witness testified that pursuant to contract with the State he had prepared a first draft of a preliminary EIS, [54] working in that connection from guidelines furnished by the Federal Aviation Agency (FAA); [55] thereafter portions were extensively revised at the direction of the State or the FAA, to which end a number of meetings were held; [56] there were numerous drafts, the witness having "lost count after about nine or ten," [57] some portions of which were re-written directly by the FAA, and others by the State, such that authorship of any given page is now beyond identification. [58] The district court was led by this testimony to satisfaction that "my understanding of his role was that he was an editor." [59]

---

[52] *Id.* at p. 366.

[53] *Id.* at pp. 296-303, 350-89.

[54] *Id.* at pp. 298, 351.

[55] *Id.* at pp. 345-55.

[56] Transcript, pp. 298-99, 351, 353.

[57] *Id.* at p. 360.

[58] *Id.* at pp. 298-99.

[59] *Id.* at p. 376.

It was only after petitioners' counsel had become manifestly dissatisfied with the information which examination of the witness was producing, and had descended to plainly petty unproductive quibbling about minute details, that the district court, in the interests of keeping the inquiry within some reasonable bounds, imposed any manner of limitation on petitioners' offer of "proof" on this subject. On the heels of inquiry of the witness concerning the location of the numerous draft pages of the EIS which had been revised, the district court understandably observed that "I really don't see where you are going,"[60] and finally ruled that:

> "THE COURT: . . . I'll sustain the objection to any further examination of this detailed character of what Mr. Dittmar did and what piece of paper he got first, who he saw first, what telephone calls he made, how many drafts he typed up or who typed them, where he took them, et cetera.
>
> "MR. HART: Those kinds of questions, Your Honor, were only preliminary to the substance how—
>
> "THE COURT: Well, they were taking an awful long time . . . . I'm ruling that it's of no interest who actually pushed the pen and who actually described the English words or anything—
>
> "MR. HART: Sure, okay.
>
> "THE COURT: —who used the dictionary."[61]

Petitioners' counsel acknowledged with commendable candor that he had no "hard evidence" to present in support of the notion of the complaint that there had

---

[60] *Id.* at p. 360.

[61] Transcript, pp. 364-65, 367.

been some species of wrongful delegation of official responsibilities to an interested private contractor, and that what petitioners really had in mind in this regard was "to ask everybody a lot of questions to see if [they could] develop it."[62]

There was other evidence of the active participation of appropriate federal officials in the preparation of the EIS, both in Honolulu and in Washington,[63] which petitioners' "statement of the case" ignores.[64] While the federal officials who testified were cross-examined by petitioners at great length,[65] the cross-examination seems to have touched this subject only cursorily or not at all, and certainly was unproductive of any information even remotely tending to suggest that the responsible federal agency officials had merely "rubber stamped" a final product of a private consulting firm. The district court inevitably found as fact that:

> ". . . . Here the evidence shows that FAA officials did in fact work together with state officials and a private contractor in the preparation of the EIS and gave it close attention."[66]

---

[62] *Id.* at p. 372.

[63] The Chief of the Environmental Staff of the Planning Division, Airport Service, FAA Headquarters in Washington, Transcript, pp. 743-73, and the Chief of the Pacific Region, Airports Division, FAA, in Honolulu, *id.* at pp. 820-37. Indeed, it appeared that the regional director of the FAA in Honolulu had been an active member of a citizens' Task Force Committee which had been publicly exploring the airport problem for some years prior to NEPA's enactment. *Id.* at p. 822. See 485 F.2d at 464-65, App. A of Petition, pp. 7-8.

[64] *Cf.* Petition, p. 10.

[65] Transcript, pp. 773-812, 837-53.

[66] 363 F.Supp. at 1175, App. C of Petition, pp. 40-41.

The court of appeals concurred in this finding, and concluded that there was no basis for suggestion that the federal agency here did " 'abdicate a significant part of its responsibility' to another organization," or that there was otherwise "any improper or illegal delegation in this case." [67]

Like the original complaint in the district court, the present petition treats of purported omission from the EIS of discussion of "alternatives" to the project in wholesale terms, without specific identification or separate analysis, or even list for that matter, of precisely what "alternatives" petitioners had or have in mind. [68] Judging from incidental references here and there in the petition, petitioners seem to persist in at least passing mention of the following from among the numerous random "Monday morning quarterback" suggestions of alternatives to the project which they made below:

> 1. "[R]equire the two commercial inter-island carriers, Hawaiian Airlines and Aloha Airlines, to commence their takeoff runs of their twin jet DC-9's and Boeing 737's, respectively, from the far western end of the existing primary jet runway, rather than from the present takeoff point, approximately 4,000 feet to the east and closer to populated areas." [69]
>
> 2. "[R]emoving military and general aviation from HIA [Honolulu International Airport]." [70]

---

[67] 485 F.2d at 467-68, App. A of Petition, pp. 14-15.

[68] Compare concurring and dissenting opinion of Judge MacKinnon in National Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 840 (D.C. Cir. 1972).

[69] Petition, pp. 8, 19 (n. 7), 20.

[70] *Id.* at pp. 9, 18-19 (n. 7), 20-21.

> 3. "[I]mproving air traffic control, employing aircraft with less noisy engines, retrofitting older aircraft with quieter engines, adjusting and consolidating airline schedules so as to increase the passenger load factor on individual flights, and converting the aircraft fleet to wide-body aircraft." [71]

Petitioners seem thus to have now confined their alternative suggestions to so-called "non-construction" alternatives,[72] and to have abandoned alternative *construction* ideas which they belabored below, including, for example, the notion that instead of building a new runway further away from all populated areas, the existing runway should have been extended into the adjoining Hickam Air Force facility, knocking down and relocating some $22,000,000 worth of Air Force installations on the way, and transferring noise pollution from one Honolulu neighborhood to another.[73]

The courts below were unimpressed with the factual record made by petitioners concerning the reasonableness and feasibility of the "alternatives" they claim were improperly ignored.

For example, petitioners' plea for "removing the Air Force KC-135 tanker operations from HIA to a

---

[71] *Id.* at pp. 9, 19 (n. 7).

[72] See *e.g.*, Petition, pp. 3, 8.

[73] Extended study of this rejected alternative is reported in the EIS. Ex. D-1, pp. 34-35, and reference 17 thereof (*id.* at p. 45), in evidence as Ex. D-20. The court of appeals could find no justification in fact or reason for petitioners' claim that this alternative should not have been rejected. 485 F.2d at 470-71, App. A of Petition, pp. 21-22.

nearby military airport" [74] was and is supported by no evidence or even plausible argument as to where the planners might have found the spectral "nearby military airport" to which Air Force operations might have been removed. The only apparent evidential undertaking by petitioners on this subject was cross-examination of respondents' witnesses, which was notable for its lack of success. The following is illustrative:

> "Q (By Mr. Sherwood) I might say, by the way, that I agree with all what you said—the plaintiffs do, too, certainly, your concern for the safety of the people of Kalihi-Palama. If everything you've said about the KC-135 Tanker flying sometimes perhaps over gross full of volatile fuel, wouldn't a reasonable position to take be that those tankers shouldn't be using Honolulu International Airport at all? They shouldn't be flying around populated civilian areas? They shouldn't be using a civilian airport?
>
> "A I think the thing we've learned with the Reef Runway is that there are many, many factors involved and that all of these factors really have to be taken into consideration. As I understand, that's what this suit is all about. Whether that is the case or not, I don't know. I know this: That they are operating out of here and that within the realm of political and physical reality we try to come up with a solution not just for Kalihi-Palama, but for the whole community that would be the best solution under the circumstances. I can see where obviously removing airports is a better solution, but no one has come up with the billions of dollars that it would take to remove it. . . . [I]t would cost a considerable amount of money because there has been testimony in the

[74] Petition, pp. 20-21.

> past that in order to use Barbers Point they can't use the existing runways because they're pointed right into the mountains and they would have to create a whole new runway out there. They would have to relocate the underground fuel facilities plus enormous other facilities—communications, maintenance and so forth and worse than that, the Governor from the outset had stated that he wouldn't transfer the noise to another community —that we were going to have to solve this problem right where it was and I think justifiably so, you'd pollute Ewa Beach with noise to a world beyond belief if we moved the tankers to Barbers Point, so to us that's a non-solution and I think rightfully so. After all the experts testified somebody had to get on with the project that would solve the problem and that was our job." [75]

Similarly, the only evidence offered by petitioners in support of their present insistence upon "removing . . . general aviation operations from HIA altogether," [76] as an alternative to the project, was, if anything, inconsistent with that plea. An amateur weekend pilot of light, single-engine, so-called "general" aircraft, briefly testified on behalf of petitioners [77] that in his opinion:

> ". . . general aviation should be allowed freedom into and out of all public airports including large hub airports such as Honolulu, but that the degree of mixture that exists at Honolulu International is basically unhealthy. It is unique to some extent at Honolulu International from my observation to have as much military, commercial and general aviation operating simultaneously and

[75] Transcript, pp. 735-37.

[76] Petition, p. 20.

[77] Transcript, pp. 304-310.

> concurrently out of the same general airport area. I think that it's highly desirable to have some alternatives. . . .
>
> "THE COURT: But, you don't like the alternative of moving all the general aviation out of there altogether?
>
> "THE WITNESS: Not as a mandatory move; no, Your Honor, I don't. I think that there is every reason to assume that general aviation should have access to Honolulu Airport, but at the moment no alternatives—workable alternatives for Honolulu general aviation exist. . . ." [78]

Having thus succeeded in disproving their claim by their own witness' testimony, petitioners hastily dropped the subject in the district court.[79] Other evidence, conveniently not mentioned in petitioners' "statement of the case," was to the effect that the problem of general aviation is essentially one apart from and collateral to the prime purposes of the project, namely, to reduce noise pollution and crash dangers from large jet aircraft; that in and of themselves small "general" aircraft are no particular problem, except insofar as they interfere with large aircraft operations and pose collision risks; and that efforts are in progress to relocate general aviation quite independently of the project,[80] the same being frustrated for the present because whenever a new location for general aviation has been proposed "environmentalists rose up with hue and cry."[81]

---

[78] *Id.* at p. 309.

[79] Respondents, of course, omitted cross-examination. Transcript, p. 310.

[80] Transcript, pp. 550-56, 650-52, 737-38.

[81] *Id.* at p. 737.

Evidence in support of petitioners' suggestion that need for the project could be eliminated by the simple and expedient alternative of requiring pilots of the smaller inter-island carriers to make full use of the existing runway took the form of opinion testimony by an Hawaiian Airlines pilot to the effect that if all pilots of the smaller DC-9's and Boeing 737's used by inter-island carriers were forced to takeoff from the end of the existing runway, as the witness himself insists on doing, rather than being permitted to takeoff from about half way down, noise and safety problems arising from *these particular aircraft* could be largely reduced if not eliminated.[82] There was and is no evidence or argument as to how reduction of noise pollution and crash hazards from these smaller aircraft could in any way be thought to be an "alternative" to elimination of noise pollution and crash hazards from the larger commercial and military jet aircraft, which latter is the prime purpose of the project. Again, other evidence indicated that the problem of the takeoff point of these smaller aircraft is essentially a collateral one; that after the larger aircraft are moved to the new runway when completed, the smaller aircraft to which the witness referred will continue to use the existing runway, at its full length as the witness urged.[83] Indeed, conspicuously absent from petitioners' "statement of the case,"[84] is acknowledgment that on cross-examination their pilot

---

[82] Transcript, pp. 206-237.

[83] *Id.* at pp. 640, 737-38.

[84] At Petition, p. 8, record reference is scrupulously confined to "Tr. pp. 206-19, 230-1," which reflects only the witness' direct and redirect examination, and avoids intervening cross-examination.

witness fully agreed that under all the circumstances the latter is an ideal solution:

"Q. Now I pose to you this hypothetical. If we have the reef runway constructed—and I will state that as a matter of proof we will establish this—that the intention—the present plan is to have the larger aircraft taking off at the—on the reef runway and the present projected plan is to have the inter-island aircraft take off at the threshold of the present existing runway 8-26—would that not solve the problem that the APA is objecting to?

"A Well, I was not aware of that. My immediate question is: is as to why they do not recognize that safety factor now and allow us to go to the end of runway 8. They obviously are thinking about it because that's the plan to put us down there where we belong. Your point is correct—that we will have our own interval of take-off. The only question I would make that you have a 12,500 foot runway there now and I do not conceive that they will not be utilizing it regardless of what you've got.

"Q. We're talking about the—whether or not the reef runway project should be constructed or not.

"THE COURT: No, we're not.

"MR. HIGA: Excuse me, Your Honor. What—

"THE COURT: We're talking about whether or not the government has met the requirements of the statutes with respect to the expenditure of public funds on a significant project involving federal action.

"MR. HIGA: That's correct. I stand corrected on that phrasing.

"Q. (By Mr. Higa) My point was that wouldn't the construction of the reef runway project,

therefore, be a solution to the problems that the APA's is objecting to at this point?

"A. Yes, that point is made." [85]

Finally, and perhaps most remarkable of all, is the "evidence" upon which petitioners rely for the propositions that the project must be halted because the EIS contains no discussion of the possibility that the need for its construction might become unnecessary if the entire existing aircraft fleet were replaced by larger and quieter airplanes, and subjected to some sort of revised schedules, and that by declining to accept this notion the courts below were guilty of "brushing off the positive experience with these techniques at other airports." [86]

Petitioners' reference in this regard to "Tr. . . . 815-16 (National Transportation Report)" [87] is to a reading by counsel of excerpts from an article in a magazine called "Airport World," which purported to report upon a certain study, as follows:

"MR. SHERWOOD: It's two paragraphs, actually. It's captioned 1972 Transportation Report. After almost two years in the works, the 1,000-page 1972 National Transportation Report—

"THE COURT: Not so fast.

"MR. SHERWOOD: I'm sorry . . . . has been submitted by Secretary of Transportation, John A. Volpe. The first of its kind, the report contains a

[85] Transcript, pp. 226-27. The reference in the questions and answers to "APA" is to the Airline Pilots Association, of which the witness is a member and on behalf of which he sometimes spoke. *Id.* at pp. 208-209, 220.

[86] Petition, pp. 9, 19 (n. 7).

[87] *Id.* at p. 9.

> comprehensive picture of the present status of the nation's transportation system and the planning needed to improve it. And then there's a quote within the quote: Through this report and its successors, close quote, Volpe said, quote, we shall present guidelines to all branches and levels of government involved in the attainment of the President's goal of a balanced transportation system, closed quotes within the quote.
>
> "The next paragraph says: The report lists a 27 billion dollar need for airports among other categories involved with the movement of people and goods through 1990. It's stated that significant reductions can be made in current and anticipated delays at the nation's large traffic hubs by making better use of existing capacity prior to investing in increased facilities. Potential remedial actions put forward included, the diversion of some general aviation traffic to existing reliever airports and the minor rescheduling of commercial flights around peak periods."

Petitioners' reference to "'The Jamaica Bay-Kennedy Airport, A Multi-Disciplinary Environment Study,' in evidence as P-4(a) and P-4(b); Tr. 407-13, 423-4, 427-31 (testimony of Prof. Joseph Sax)"[88] is evidently to the "testimony" of a law professor, which was actually legal argument heard by the district court, nevertheless, from the witness stand rather than from the bar in the guise of expert opinion concerning "industry practice" in the business of preparing environmental impact statements for airport projects.[89]

---

[88] Petition, p. 9.

[89] In response to obvious objection that law professors should not be instructing district courts on the law from the witness stand, the district court invited the professor's association as coun-

The witness discoursed at some length as to his views of what should go into an EIS in order to comply with NEPA and AADA, relying largely in that regard upon the so-called "Jamaica Bay" study, which he helped prepare, as "a useful and instructive model . . . for what an environmental impact study for an airport should be . . . ."[90] That voluminous study itself was offered into evidence "as illustrative of his testimony and not for the truth of the facts stated therein."[91] It was noted in passing that this "model" Jamaica Bay study discussed such things as using larger and quieter aircraft and revising flight schedules.[92] The apparent implication was and is that since a "model" EIS discusses such things and the one before us does not, it necessarily follows that the one before us is fatally defective.[93] How or why such an implication might be made, and how or why purported solutions to New York problems could be said to be otherwise applicable holus-bolus to Honolulu, was unexplained by evidence or argument. Indeed, the witness himself qualified his reliance upon the Jamaica Bay-Kennedy Airport study by noting that its content was significant "as to *that* airport at least," and that he did "not know to what extent this particular example ap-

---

sel, in which capacity he might have presented argument in the usual way. Transcript, pp. 399-401. Petitioners declined this invitation and insisted that the professor "testify." The district court relented, saying, "Well, I'm going to let him tell us all about it anyway." *Id.* at p. 402.

[90] Transcript, p. 431.

[91] Transcript, p. 447.

[92] *Id.* at pp. 408-413.

[93] *Cf.* Transcript, pp. 423-24.

plies to your airport here."[94] Certainly there was no evidence or argument as to how or why the Kalihi-Palama residents, for example, not to mention the inhabitants of the federal courthouse in Honolulu, would or should consider their death and destruction as a result of crash in their midst of a new, larger and quieter rescheduled aircraft as a "reasonable and feasible alternative" to a similar disaster resulting from crash of an aircraft of present design operating under present schedules.

Be that as it may, there was, again, additional evidence on the subject not mentioned in petitioners' "statement of the case." For example, a responsible FAA official, found by the district court to be at least as qualified as the petitioners' Prof. Sax to testify concerning "industry practices" in the business of preparing environmental impact statements affecting airports,[95] advised that among the 282 environmental impact statements involving airports which he has reviewed not a one contained discussion of the imaginative "non-construction" alternatives which petitioners and their witness lately suggested.[96] This tended to establish that the "custom in the industry" upon which petitioners rely[97] would have to be found by a trier of fact to have arisen from a single unique case which, moreover, didn't involve NEPA or AADA in the first

---

[94] *Id.* at pp. 409, 412 (emphasis added). Among other things, the witness hadn't read the extensive references of the EIS here. *Id.* at pp. 420-21.

[95] Transcript, p. 761.

[96] *Id.* at p. 763.

[97] *Id.* at p. 423.

place.[98] The courts below were evidently unconvinced that fact-finding indulgence to that extent ought be extended to petitioners. Furthermore, it appeared that such matters as rescheduling, development of quieter and larger airplanes and traffic control improvements are long-term goals being extensively investigated, at a cost of many millions of dollars, on a nationwide basis, repetition of which in connection with the short-term needs of particular airports would be inappropriate;[99] and that "the responsible officials are well aware of the programs going on a national basis that deal with these issues and that in particular airport development projects such as this, they had no bearing, except in the long run we're doing our damnedest to improve situations."[100]

When all was said and done, the district court found, under all of the circumstances and upon the evidence adduced, that

> ". . . the discussion set forth in the EIS complies with the requirements of NEPA, or that in those instances where additional discussion or disclosure should be set forth in the EIS the only delinquency is in draftsmanship and not in any failure to consider the deleted matter as if it had been set forth

[98] It was also made to appear that the Jamaica Bay study was a non-federal undertaking commissioned at a time when "NEPA was brand new and . . . was one of the first reports that [federal officials] had seen that looked at the environment." It was seen at the time as "a good report . . . as applies to the New York area," but no request for federal aid was involved, neither NEPA nor AADA were applicable, and the study was never before the Secretary or other appropriate federal agencies for official review and decision. Transcript, p. 802.

[99] Transcript, pp. 761-63.

[100] *Id.* at p. 810.

> in full in the EIS, or that the question raised by plaintiffs is one to which the EIS need not address itself . . . .
>
> ". . . . [I]t does appear from the evidence that the responsible officials in the decision making process and in the review processes did in fact consider many alternatives, including nonconstruction alternatives. I am persuaded that Mr. Thompson is right when he argues that a detailed discussion of national programs to reduce noise pollution and to improve operational efficiency should not have to be repeated in every EIS for every airport project." [101]

The court of appeals concurred, noting, among other things, that "there is nothing in the record to indicate that alternatives such as the readoption of airline schedules, imposition of curfew restrictions, or conversion to wide-body aircraft design are either reasonable or feasible alternatives in this case." [102]

ARGUMENT

I

To the Extent Discernible, Petitioners' Grievances Are Those of the Disappointed Litigant Whose Claims Have Been Heard Fully, Fairly and at Great Length by Two Lower Courts and Been Found Wanting in Fact. This Court's Certiorari Power Ought Not Be Consumed in Review of Factual Questions.

This is not a case arising on pleadings or otherwise preliminarily in which a litigant has been denied opportunity to air his grievances on the basis of some stark question of law. To the contrary, petitioners succeeded, if anything too well, in commanding the

---

[101] 363 F.Supp. at 1174, 1175, App. C of Petition, pp. 37, 39.

[102] 485 F.2d at 471, App. A of Petition, pp. 23-24.

priority attention, ahead of other litigants awaiting the courts' services, of two lower courts—the District Court for the District of Hawaii and the Court of Appeals for the Ninth Circuit—at almost unseemly length, and were given the fullest opportunity to substantiate their claims by factual demonstration and argument upon preliminary hearing, trial and appeal.[103] Petitioners do not suggest otherwise. It has been seen that these lower courts found petitioners' claims to be wanting in fact.

To the extent discernible from the obscure petition,[104] petitioners seem to be claiming now, while disdaining to identify the compelling considerations which might lead to a conclusion that the lower courts' appraisals of the evidence were clearly erroneous under Rule 52(a), Federal Rules of Civil Procedure, or otherwise, that the courts below should have given

---

[103] Complaint was filed in the district court on November 8, 1972. By December 22, 1972, petitioners had enjoyed fully seven day's hearing attention and consideration of thousands of pages of documentary materials. On March 29, 1973, petitioners declined opportunity to present further evidence at trial on the merits. Final judgment of the district court was entered on April 13, 1973. Appeal to the 9th Circuit, filed April 27, 1973, was treated on an expedited basis. By August 7, 1973, the Court of Appeals had considered several hundreds of pages of briefs and heard oral argument at length well beyond normal time limits. The court of appeals' decision was entered on September 10, 1973. 485 F.2d at 463. No doubt this Court may take judicial notice that "ordinary" litigants in federal courts do not enjoy similar volume and speed of judicial attention.

[104] *Cf.* Rule 23(4) of the Rules of this Court:

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

greater weight to the "evidence," such as it was, offered by petitioners, and discredited the evidence given by respondents.

It has never been thought that this Court's important certiorari jurisdiction should be dissipated in rehash of facts which have been explored in depth by lower courts, particularly when a court of appeals has already fully reviewed and approved a factual analysis by a district court. *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.*, 336 U.S. 271, 274-75; *Berenyi* v. *Immigration Service*, 385 U.S. 630, 635. There is nothing in this case which recommends departure from that tradition.

II

Deficiencies in Petitioners' Proof Are Massive, Extending To Failure To Demonstrate So Much as Standing. Upon the Facts (or Lack Thereof) Here, There Is No Conflict With Decisions in Other Circuits.

Granting that this Court's office should extend to second-guessing of inferior courts' fact finding, it avails petitioners nothing, for even cursory review of the record discloses that they proved nothing. While the petition leaves some doubt on the subject, these respondents, at least, refuse to assume, even for purposes of argument, that petitioners would go so far as to suggest that the courts below should have acted in their favor on the basis of their bare allegations and argument, without regard to evidence, or lack thereof, adduced at trial.[105]

---

[105] At one point, petitioners seem to be complaining that "the Ninth Circuit places the burden *upon Petitioners* to demonstrate" at least something (Petition, p. 15, emphasis in original), but elsewhere they seem to concede that it is required at least that "plaintiffs present *prima facie* evidence" (*id.* at p. 27).

Whatever other revolutions may have been introduced into the law by NEPA, AADA and related enactments concerning the environment, it has never been supposed that the courts, including particularly this Court, have thereby been ordained as roving supervisors of the environment obliged or even enabled to halt projects willy-nilly upon someone's mere complaint. Presumably NEPA and AADA leave intact the time-honored notion that the judiciary is essentially a passive instrument of government, which acts only when someone convincingly demonstrates a justiciable grievance. This basic notion is more, not less, pertinent in the currently emotional context of "environmental" concern. Rape of the land, like rape of a human female, as Lord Hale observed in the latter case some 300 years ago, "is an accusation easily to be made and hard to be proved; and harder to be defended by the party accused, tho never so innocent." *I. M. Hale, Pleas of the Crown* 635. In a word, it takes more than inflammatory words to excite a court to action. He who claims judicial relief must prove its need.

At the very least, the seeker of judicial intervention must demonstrate that he has "standing" to invoke the judicial machinery; that he is or will be injured or aggrieved in the sense of being "a person with a direct stake in the outcome of a litigation—even though small," as distinguished from "a person with a mere interest in the problem." *United States* v. *SCRAP*,——U.S.——,——, 37 L.Ed.2d 254, 270-71, n. 14. The courts below erred, if at all, only in entertaining petitioners' strident nit-picking grumbling to the lengths they did after it became, or should have become, clear that petitioners were unwilling or unable to satisfy this threshold requirement.

It may be conceded for this purpose that some relaxation of the usual requirement that the applicant for exercise of a court's awesome injunctive power show direct injury to himself may be warranted in so-called "environmental" cases, but certainly relaxation does not go beyond that suggested by Justices Blackmun and Brennan concurring in *United States* v. *SCRAP, supra,* to the effect that:

> ". . . responsible and sincere representatives of environmental interests, show that the environment would be injured in fact and that such injury would be irreparable and substantial." (37 L.Ed.2d at 276).

It may also be conceded that at the outset petitioners had sufficiently alleged that form of irreparable injury to the environment, if not themselves, which would meet such relaxed test of standing. However, mere allegation is not enough. As stated in *SCRAP*:

> "Of course, pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action. And it is equally clear that the allegations must be true and capable of proof at trial." (37 L.Ed.2d at 270).

When all was said and done at an extensive trial, and upon a searching appeal, it was found that petitioners had not proven any manner of injury to the environment in fact save disturbance to certain bird habitats, and that that adverse environmental effect, moreover, was in all respects reparable and being repaired by costly inclusion in the project of replace-

ment habitats for the displaced birds. 485 F.2d at 473. Claiming no error in that finding, and indeed omitting challenge of finding that on the whole the project will *improve* the environment by eliminating the spectre of a disastrous aircraft accident in a populated area, reducing noise pollution by moving it more than a mile away, reducing air and water pollution, enhancing recreational boating facilities, and improving area fishing, 485 F.2d at 465, petitioners remit themselves to claim, in effect, only that the same enviornmental benefits might have been achieved at lesser monetary cost by means of certain alternatives which they suggest, and that pursuit of such monetary savings may have been dissuaded by the biased influence of a private contractor who participated in analysis of the project and the preparation of an EIS. In the absence of a showing, or justiciable claim, of environmental harm cognizable under NEPA, the concerns underlying these claims are essentially political ones shared with petitioners by all citizens and taxpayers. There is no apparent reason why petitioners should have special standing to require this Court, or any other, to pass upon such questions.

Given that inquiry on these subjects at the behest of petitioners, or at all, is appropriate at this juncture, petitioners' contentions are plainly without merit in the light of the record which they made, or rather didn't make.

Far from placing itself at odds with the decision of the District of Columbia Circuit in *National Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827 (1972), as suggested by petitioners,[106] the court of appeals here

[106] Petition, p. 21.

actually and quite properly took that case as its text.[107] Unlike this case, *Morton* did not arise on appeal from a full trial on the merits, but on a motion for summary reversal in connection with an appeal from the grant of a preliminary injunction. While by no means required so to do, the court discoursed at some length concerning NEPA's requirement of consideration and discussion of alternatives to a project for guidance on remand. In so doing, the court indicated that certain "alternatives" suggested by plaintiffs in that case need not have been discussed in an EIS or otherwise considered, but that still other alternatives suggested by plaintiffs might or might not have required report of attention depending upon ultimate proof, saying, among other things, that the test in the final analysis should be that:

> ". . . [T]he requirement in NEPA of discussion as to reasonable alternatives does not require 'crystal ball' inquiry. Mere administrative difficulty does not interpose such flexibility into the requirements of NEPA as to undercut the duty of compliance 'to the fullest extent possible.' But if this requirement is not rubber, neither is it iron. The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research—and time—available to meet the Nation's needs are not infinite.
>
> "* * *
>
> "In the last analysis, the requirement as to alternatives is subject to a construction of reasonableness, and we say this with full awareness that this approach necessarily has both strengths and weaknesses . . . .

[107] 485 F.2d at 472, App. A of Petition, p. 24.

> "There is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of 'alternatives' put forward in comments when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities, . . . making them available, if at all, only after protracted debate and litigation not meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed.
>
> "A final word. In this as in other areas, the functions of courts and agencies, rightly understood, are not in opposition but in collaboration, toward achievement of the end prescribed by Congress. So long as the officials have taken the 'hard look' at environmental consequences mandated by Congress, the court does not seek to impose unreasonable extremes or to interject itself within the area of discretion of the executive as to the choice of the action to be taken." (458 F.2d at 837-38).

Any notion that an EIS conformable to NEPA must anticipate every conceivable "alternative" which any Monday morning quarterback might dream up, in contrast to the rule of reason posited by the District of Columbia Circuit, is, of course, silly on its face. Other courts of appeal have likewise seen a need for injection of some measure of reason in consideration of "alternatives" to projects said to disturb the environment. Likewise by way of guidelines on remand, the Fifth Circuit, for example, observed in *Allison* v. *Froehlke,* 470 F.2d 1123, 1128 (1972), that

> ". . . The trial, if possible, should be kept within reasonable limits. Undoubtedly witnesses and experts can be found who, because of their predilections, will advance their own theories as to how the project should be carried out—if at

> all. The number of potential alternatives may well be in direct ratio to the number of experts called. To some, even the habitat of the 'rare golden-cheeked warbler' should be preserved despite the damage and dangers caused by floods. However, the selection of the important and dispositive issues will be for the trial court . . . ."

Applying, not defying, the cogent analysis of the *Morton* case, and decisions of other courts which have consistently followed it without discernible conflict, the court of appeals read the full trial record here as showing in fact that the "alternatives" urged by petitioners were either not alternatives at all, in the sense that they did not tend to solve the problem to which the project is addressed, or that they were simply not reasonable and feasible. In this the court of appeals had ample substantial record support. Apart from positive testimony by a responsible federal official to the effect that so-called "non-construction' alternatives suggested by petitioners are and have been under consideration by appropriate federal agencies as long-term solutions to airport problems, but are inappropriate to the short-term needs of a particular airport, certain of the suggested "alternatives" are on their faces "remote and speculative" and "not meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed," within the meaning of *Morton*. Obviously, for example, it makes no sense to suggest that as an alternative to relief from noise pollution and crash hazards sought by Honolulu residents *now*, they should await some indefinite future date when newer, larger, quieter and safer airplanes might be developed and substituted for the existing multi-billion dollar aircraft fleet.

It is difficult to perceive how an issue under *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, could be said to be involved here. That case held simply that review of an administrative determination that no reasonable and feasible alternatives to a project exist should not be confiined to consideration of self-serving affidavits in support of a motion for summary judgment. A summary judgment was there reversed in favor of more searching inquiry, which it was noted could extend to requiring "the administrative officials who participated in the decision to give testimony explaining their action" (401 U.S. at 420), but which in any case must be sufficient to enable the reviewing court "to find that the Secretary could have reasonably believed that . . . there are no feasible alternatives," considering in that connection "whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment" (*id.* at 416). It was noted that:

> ". . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." (401 U.S. at 416).

Unlike the petitioners in *Overton*, the petitioners here were plainly not the victims of a summary judgment. On the contrary, they were the beneficiaries of precisely that sort of "searching and careful" inquiry which *Overton* mandates; administrative officials testified explaining why they did not look upon the "alternatives" suggested by petitioners as reasonable or feasible ones, and were subjected to extensive cross-examination; all things considered, the courts below were satisfied with the explanations, and

otherwise that "the Secretary could have reasonably believed that in this case there are no feasible alternatives," in all respects in accord with *Overton*. There is no basis for suggestion that the decision of the court of appeals here conflicts with *Overton*, much less *Morton*.

Similarly, petitioners' insistence that the decision of the court of appeals here in some way conflicts with that of the Second Circuit in *Greene County Planning Board* v. *Federal Power Com'n*, 455 F.2d 412 (1972), *cert. den.* 409 U.S. 849, is based on assumption of a factual predicate which is not only lacking from but at odds with the record here. That is to say, in *Greene* it was found as fact upon the record of hearings held for that purpose that

> "The Federal Power Commission has abdicated a significant part of its resposibility by substituting the statement of PASNY for its own. The Commission appears to be content to collate the comments of other federal agencies, its own staff and the intervenors and once again to act as an umpire." (455 F.2d at 420).

While petitioners assuredly *alleged* that the government had similarly delegated the preparation of an EIS to another here, the allegation was simply not borne out by the evidence from which it was clear that federal officials at all times played an active and responsible role in developing the EIS, and, indeed, that it was the purported delegee who performed an essentially clerical and editorial role in collating the comments and instructions of the administrators. Even petitioners yield to the record to some extent by asserting now not that the private consultant had wholly usurped federal responsibility, as originally alleged,

but that it "actively participated in the preparation of the EIS." Petition, p. 28. It has been seen that petitioners' statement in this regard that they "were precluded by the trial court from developing" the subject is simply a misstatement of the record. On the contrary, petitioners were afforded every opportunity to examine the officials, state and federal, not to mention the private consultant, concerning this matter, and were "precluded" in that regard only by the district court's unquestionably proper discretionary limitation of interrogation when it descended into time-wasting pursuit of unproductive minutiae. See *Cafasso* v. *Pennsylvania R. Co.*, 169 F.2d 451, 454 (3rd Cir. 1948); *New England Trust Co.* v. *Farr*, 57 F.2d 103, 110 (1st Cir. 1932); proposed *Rules of Evidence for United States Courts and Magistrates*, Rules 403 and 611(a). No "delegation" question under *Greene* or otherwise survives.

III

The Existence of Possible Nuances of Difference Among the Circuits in Defining the Precise Standard of Review in a NEPA Case Could Be of Only Academic Interest in This Case, Where the Basis of Review Was Inquiry Sufficiently Broad To Accommodate Any Conceivable Test.

Without undertaking to point out precisely how they would have fared differently had the court of appeals articulated the standard of review differently, petitioners complain that the Ninth Circuit applied the "very limited 'arbitrary and capricious' standard of review" of § 706(2)(A) of the Administrative Procedure Act, while other circuits have espoused somewhat more liberal standards, at least three different varieties of which petitioners purport to see in the cases. Petition, pp. 14-16.

While it may be doubted whether the apparent differences among the circuits in this regard are substantial, as distinguished from merely semantic, these respondents are constrained to agree with petitioners that various circuits have formulated the applicable standards of review in NEPA cases in somewhat different terms. Indeed, it may be acknowledged that even different panels within the Ninth Circuit are not agreed upon the precise categorization and verbalization of the applicable test. Compare the opinion of the panel here with the opinions of other panels of the Ninth Circuit in *Environmental Defense Fund, Inc.* v. *Armstrong*, 487 F.2d 814, 817 (Nov. 9, 1973), and *Lathan* v. *Volpe*, Nos. 72-2932 and 72-2974, December 7, 1973, Slip Opinion, p. 4.

There may be cases in which a difference between an "arbitrary and capricious" test and a "reasonableness" test may be operative, and in which it would become profitable to wrangle with or reconcile the differing formulations of the several circuits. This, however, is not one of them. It may be noted that the *district* court's opinion may be searched in vain for espousal of any particular formulation of a specific standard or review. Instead, as is apparent from the face of the record and its opinion, the district court, transcending subtleties on this subject, proceeded to conduct a full and searching inquiry into the facts concerning the project and petitioners' grievances in connection therewith, sufficient to accommodate any conceivable standard of review, and, without regard to which party or parties had the burden of proof or to what extent, came away satisfied that in fact the appropriate administrative officials had fairly, adequately and reasonably taken that "hard look" at environ-

mental consequences which, in the end, is the ultimate purpose of NEPA and AADA. A tendency to refuse to grapple with formal standards of review, and to go to the substantive heart of things by searching inquiry, in the spirit of *Overton*, seems to be characteristic of district courts. *Cf. City of New York* v. *United States*, 344 F.Supp. 929, 940 (E.D. N.Y. 1972).

The record situation here is such that settlement of precise definition of the standard of review is unnecessary because the result would manifestly have been the same under any imaginable standard. One need go no further than the Ninth Circuit itself for confirmation of this observation. In *Lathan* v. *Volpe*, Nos. 72-2932 and 72-2974, December 7, 1973, a different panel of that circuit, some weeks after the decision in this case, expressed doubted that the panel in this case had applied the proper standard of review, but noted that that couldn't have made any difference:

> "... In *Life of the Land* v. *Brinegar*, 9 Cir., 1973 [485 F.2d 460, 469] ... we quoted *Jicarilla Apache Tribe, supra*, regarding substantive decisions, but then apparently applied § 706(2)(A) to the question whether the EIS satisfied the requirements of NEPA . This appears to be a misreading of *Jicarilla Apache Tribe*, but our reading of *Life of the Land* convinces us that the result would be no different if we had thought that § 706(2)(D) applied. We later said as much in *Environmental Defense Fund, supra* [487 F.2d at 817], fn. 7...." (Slip Opinion, p. 4).

In *Environmental Defense Fund, Inc.* v. *Armstrong*, 487 F.2d 814, 817 (November 9, 1973), still another panel of the Ninth Circuit, which entertained still a different view of the applicable standard, likewise saw

the difference, however, as not making any difference in the context of the particular record before it:

> "*But see* Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1275, 1280 (9th Cir. 1973), which uses 5 U.S.C. § 706(2)(D) as the appropriate standard, permitting appellate review of findings and conclusions found to be 'without observance of procedure required by law.' Under the circumstances of this case, either test would lead to the same result."

Likewise to the effect that grappling with the definition of the proper standard of review is an unnecessary exercise in academics when a trial court has conducted a full inquiry and made findings accordingly, see *Hanly* v. *Mitchell,* 460 F.2d 640, 648 (2nd Cir. 1972), and compare *Sierra Club* v. *Froehlke,* 345 F. Supp. 440 (W.D.Wisc. 1972), *aff'd* 486 F.2d 946, 951 *et seq.* (7th Cir. 1973).

In the final analysis, three respondents agree that petitioners are probably correct in their observation that there seems to be some uncertain confusion among, not to mention within, the circuits concerning the precise standard of review in environmental cases. Respondents also agree that a time and case may come in which it would be desirable for this Court to exercise its certiorari jurisdiction to put the matter to rest. Respondents submit, however, that a decision by this Court on that subject would be far more meaningful in the context of a case in which subtle distinctions in the verbalization of the standard of review could be said to be realistically operative, as distinguished from this case, in which any pronouncement on the subject would necessarily be little more than an exercise in academics.

IV

In Any Event, the Relief Sought by Petitioners Is Equitable Injunction, the Availability of Which Depends Not Alone on Relative Legalities But on a Discretionary Balancing of the Interests Affected. There Is Not the Least Hint in the Petition That the Courts Below Abused Their Discretion in Withholding That Drastic Remedy Here.

Petitioners' ultimate, indeed only, prayer, of course, is not for damages at law, or for declaratory relief, or even for mandatory injunction requiring federal officials to do something they should have, but for equity's ultimate weapon, prohibitory injunction halting the project and wreaking the consequences of that event until, presumably, their demands have been met.[108] Without ending inquiry, therefore, petitioners' surviving claims might be credited at face value, and there would still remain a need for petitioners to demonstrate to this Court that the courts below abused their discretion in withholding injunctive relief, for it has long been clear that mere proof of legal irregularity gives rise to no absolute claim of right to a court's equity jurisdiction. Indeed, even proven violation of the Constitution itself is no basis for exercise of a court's awesome injunctive power in the absence of a court's discretionary satisfaction that the relative equities so require, for, as this Court noted in *Lemon* v. *Kurtzman*, 411 U.S. 182:

> "In equity as nowhere else courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding those interests have constitutional roots."

---

[108] It is no doubt anomalous to speak of *permanent* injunctions in a NEPA context. The notion that a court could permanently enjoin the State of Hawaii or anyone else from prosecuting a given public project on environmental grounds is so obviously a violation of fundamental division of governmental powers as to be beyond discussion. A court's powers end when the law's demands have been met.

There is no reason for supposing, and certainly petitioners have suggested none, that alleged environmental concerns occupy a higher estate in equity than proven constitutional violations, or that a traditional balancing of equities is not called for in a case of purported environmental "damage." Mr. Chief Justice Burger, speaking as Circuit Justice for the District of Columbia, said as much in *Aberdeen & Rockfish R. Co.* v. *SCRAP,* 409 U.S. 1207:

> "Our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead courts to exercise equitable powers loosely or casually whenever a claim of 'environmental damage' is asserted. The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of federal regulations. The decisional process for judges is one of balancing and it is often a most difficult task."

When the same case reached the full Court *sub nom. United States* v. *SCRAP,* —— U.S. ——, 37 L.Ed.2d 254, it was found to be unnecessary to "reach the issue whether, under conventional standards of equity, the District Court was justified in issuing a preliminary injunction," because it was held that "the Court lacked jurisdiction to enter an injunction in any event" (37 L.Ed.2d at 271). The implication, albeit dictum, was clear that NEPA does not otherwise do away with a court's conventional discretion to grant or deny injunctive relief according to its balancing of the equities, which will not be disturbed in the absence of convincing demonstration of outright abuse. Mr. Justice Marshall, indeed, in concurring and dissenting, made an affirmative plea for preservation in the courts of "their traditional responsibility, in passing upon a

request for equitable relief, to work an accommodation in each particular case of the competing interests of the relevant parties." (37 L.Ed. at 295-96).

Petitioners, understandably, do not address themselves to the necessity for balancing equities in adjudging the availability of injunctive relief, for the record starkly reveals that the equities so overwhelmingly favor completion of the project as to make discussion on the subject unnecessary. On the one hand, it is clear, and in any case at this stage of the proceeding undisputed, that the project will relieve the Kalihi-Palama neighborhood and the downtown sections of Honolulu of serious noise pollution and imminent danger of disastrous aircraft crash in their midst. On the other hand, petitioners have shown no more than that completion of the project will displace a customary habitat of some 20-100 rare birds, which may or may not find sufficient comfort and refuge in replacement habitats being provided for them in connection with the project at a cost of more than $350,000, and which, moreover, could easily be enlarged and enhanced for the further comfort of the birds if the expressed fears of petitioners should come to pass, even though the project proceeds to completion. Any suggestion, even had petitioners deigned to make one, that the courts below abused thir discretion in striking the balance in favor of people under the circumstances, would have been totally untenable.

Furthermore, there can be no question that courts do not in any event use their injunctive powers as *terrorem* devices to punish those who might depart from strict legal requirements in some regard, but only as a means of doing some positive good. If not wholly moot at this point, grant of petitioners' prayer

for prohibitory injunction at this time would serve no known good. Speaking as of November 13 1973, at a time when the project had been briefly halted by an order of Mr. Justice Douglas one Dr. Karl H. Bathen, an expert oceanographer who had appeared as a witness for petitioners, deposed that failure to complete construction from its present stage of progress could result in some manner of environmental harm in the form of disturbance of ocean currents, or as the deponent put it, "subsurface flushing." From November 1973 to date, construction has proceeded apace, the birds have since been displaced and remitted to their new $350,000 homes. There is no known, much less proven environmental benefit which could be gained or preserved at this juncture by grant of petitioners' prayer for injunction.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied, or, if granted, that the decision of the court of appeals should be summarily affirmed.

Respectfully submitted

TOBIAS C. TOLZMANN
2222 Kalakaua Avenue
Honolulu, Hawaii 96815
Counsel for Respondents Kalihi-Palama Community Council, James Y. Muraoka, and Takeshi Uyesugi

February 1974